

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

HONORABLE MANUEL L. REAL
UNITED STATES DISTRICT JUDGE PRESIDING

ERIC ADAMS, et al.,)
)
 PLAINTIFFS,) **CERTIFIED COPY**
)
 VS.) CV 09-9550 R
)
 I-FLOW CORPORATION, et al.,)
)
 DEFENDANTS.)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MONDAY, MARCH 15, 2010
A.M. SESSION
LOS ANGELES, CALIFORNIA

SHERI S. KLEEGER, CSR 10340
FEDERAL OFFICIAL COURT REPORTER
312 NORTH SPRING STREET, ROOM 402
LOS ANGELES, CALIFORNIA 90012
PH: (213) 894-6604

1 **APPEARANCES OF COUNSEL:**

2 **ON BEHALF OF PLAINTIFF:**

3 **GIRARDI & KEESE**

4 BY: ROBERT M. KEESE, ESQUIRE
5 1126 WILSHIRE BOULEVARD
6 LOS ANGELES, CA 90017-1904

7 **ON BEHALF OF DEFENDANT:**

8 **SEDGWICK**

9 BY: STEVEN D. DI SAIA, ESQUIRE
10 CHRISTOPHER P. NORTON, ESQUIRE
11 801 SOUTH FIGUEROA STREET
12 19TH FLOOR
13 LOS ANGELES, CA 90017

14 **SABAITIS O'CALLAGHAN LLP**

15 BY: FRANK T. SABAITIS, ESQUIRE
16 975 EAST GREEN STREET
17 PASADENA, CA 91106

18 **BOWMAN and BROOKE**

19 BY: STEPHEN J. KELLEY, ESQUIRE
20 879 WEST 190TH STREET
21 SUITE 700
22 GARDENA, CA 90248

23 **FILICE BROWN EASSA & MCLEOD LLP**

24 BY: WILLIAM E. STEIMLE, ESQUIRE
25 PETER A. STROTZ, ESQUIRE
1999 HARRISON STREET

19 SUITE 1800

20 OAKLAND, CA 94612

21 **HASSARD BONNINGTON LLP**

22 BY: JOANNA L. STOREY, ATTORNEY AT LAW
23 TWO EMBARCADERO CENTER
24 SUITE 1800

25 SAN FRANCISCO, CA 94111

19 **WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP**

20 BY: MONA R. PATEL, ATTORNEY AT LAW
21 555 SOUTH FLOWER STREET
22 SUITE 2900
23 LOS ANGELES, CA 90071

24 **MORRIS POLICH & PURDY**

25 BY: TAMMARA N. TUKLOFF, ATTORNEY AT LAW
19 501 WEST BROADWAY
20 SUITE 500
21 SAN DIEGO, CA 92101

LOS ANGELES, CALIFORNIA; MONDAY, MARCH 15, 2010

A.M. SESSION

— — —

THE CLERK: Item Number 12, C.V. 09-9550,
Eric Adams, et al. versus I-Flow Corporation, et al.
Counsel, state your appearances, please.

MS. TUKLOFF: Good morning, Your Honor.

Tammara Tukloff for Defendants DJO, LLC, and DJO,
Incorporated.

MS. STOREY: Good morning, Your Honor.

Joanna Lee Storey for Defendants McKinley Medical, LLC; Moog, Inc.; and Curlin Medical, Inc.

MR. KEESE: Robert Keese for the plaintiffs.

MS. PATEL: Good morning, Your Honor.

Mona Patel on behalf of the Defendant I-Flow Corporation.

MR. ELDRIDGE: Good morning, Your Honor.

Brian Eldridge, also on behalf of I-Flow Corporation.

MR. SCHNEEWEIS: Good morning, Your Honor.

Gerald Schneeweis on behalf of Sorenson Medical Products.

MR. STROTZ: Good morning, Your Honor.

Peter Strotz on behalf of the moving defendants

1 Astrazeneca, LP; and Astrazeneca Pharmaceuticals, LP.

2 MR. STANLEY: Good morning, Your Honor.

3 William Stanley on behalf of AstraZeneca, LP; and
4 AstraZeneca Pharmaceuticals, LP.

5 MR. NORTON: Good morning, Your Honor.

6 Christopher Norton on behalf of Stryker Corporation
7 and Stryker Sales Corporation.

8 MR. SAIA: Good morning, Your Honor.

9 Steve Saia, also for Defendants Stryker Corporation
10 and Stryker Sales Corporation.

11 MR. SABAITIS: Frank Sabaitis on behalf of Pacific
12 Medical Corporation.

13 MR. KELLY: Good morning, Your Honor.

14 | Steven Kelly on behalf of Breg, Inc.

15 THE COURT: All right. Counsel, anything to add to
16 the documents which have been filed by any of the parties?

17 MR. KEESE: Your Honor, I would just -- and I'm
18 sure the Court is aware of it, but I would like to point out
19 to the Court because both in oppositions and in reply papers,
20 it's been said that these defendants don't know what products
21 are involved either on the pain pump side or on the
22 medication side.

23 Specifically, AstraZeneca in its most recent reply
24 attached a number of documents from the FDA for various years
25 regarding the approval of the drugs that are involved here.

1 It is curious that while in their opposition and in their
2 reply they say we don't even know what drug is involved, but
3 they very specifically state they do know what drug is
4 involved at that's sensorcane (phonetic), which for
5 Astrazeneca is the brand name for Pupifcane (phonetic).
6 There are no secrets here. This is one litigation in --
7 among many filed in the action.

8 THE COURT: This is not one litigation. This is
9 about -- about, what, 70?

10 MR. KEESE: 140, Your Honor.

11 THE COURT: 140 litigations, all different. All
12 different because they are different people who have been
13 affected differently by different people and by different
14 drugs. For instance, can you tell me what drug Carol Behary
15 used? That's one plaintiff.

16 MR. KEESE: Your Honor, I can --

17 THE COURT: Can you tell me that?

18 MR. KEESE: Marcaine is the generic drug that she
19 received. I doubt -- I would have to go to my records.

20 THE COURT: Made by whom?

21 MR. KEESE: I can't tell the Court that at this
22 point in time. I can represent to the Court that the drug
23 manufacturers involved in this case have over 95 percent of
24 the market; that upon obtaining medical records -- and we
25 have -- we have sought the medical records of each and every

1 plaintiff who is named in this case; that it is common
2 practice for the doctors and the hospitals to merely enter
3 the generic name Marcaine. And without discovery directives
4 specifically to the drug manufacturers who supplied these
5 drugs on a nationwide basis we are not going to be able to
6 tell which drug it was in most of these cases.

7 We know what the product was. It is a pain pump.
8 We know what the medication is. It is Marcaine. Under what
9 brand name it was sold to the hospital is something that we
10 can only discover by utilizing the officers of this Court and
11 this lawsuit to do the discovery that's necessary to find out
12 which --

13 THE COURT: That's not.

14 MR. KEESE: -- of these four drug manufacturers was
15 responsible.

16 THE COURT: The purpose of lawsuit is not to do
17 discovery, Counsel. There is no purpose of a lawsuit to do
18 discovery. It is to decide a case. It is to decide a case,
19 some -- some problem against -- one person against another.
20 It is not to do discovery.

21 MR. KEESE: Your Honor --

22 THE COURT: It might or might not produce anything.
23 We don't do that.

24 MR. KEESE: The plaintiffs involved here and our
25 law firm have proceeded diligently to get all the information

1 we can about specific manufacturers. And I can provide the
2 Court with specific information about pain pump
3 manufacturers. That's easier because in many of the medical
4 records that's so indicated, and we have even gotten billing
5 records from the hospitals to find out which company was
6 billed for the pain pump.

7 THE COURT: What you are asking this Court to do is
8 asking each individual plaintiff, 140, that we are going to
9 have into courtroom a list of about 30 companies who have to
10 hire lawyers to come in to defend and not knowing whether or
11 not that person ever or that -- or that defendant ever did
12 anything to that plaintiff. Every time we are going to have
13 to have all the lawyers come in and answer a complaint either
14 denying that they were the person involved or denying that
15 they did any damage to the person involved.

16 MR. KEESE: That's --

17 THE COURT: That's what lawsuits are about.

18 MR. KEESE: And that is the way this lawsuit would
19 proceed.

20 THE COURT: Oh, calling all of them in every time?

21 MR. KEESE: No.

22 THE COURT: Some plaintiff said I did this --

23 MR. KEESE: No, I don't think that's.

24 THE COURT: -- because I want to find out whether
25 or not this was this plaintiff who did what I claim they did.

1 MR. KEESE: I don't think that will be necessary at
2 all, Your Honor. It will not be necessary for them all to
3 come in when -- when Peter Smith alleges that I-Flow
4 manufactured the product that was inserted in his shoulder,
5 and we have the medical records and we have the I-Flow
6 records, first of all, there probably will no dispute at that
7 point that I-Flow's product was used.

8 Secondly, the other manufacturers -- and they are
9 not 30; there are a dozen -- will have -- will have no need
10 to even interfere in that particular instance.

11 THE COURT: You have that one -- then separately
12 file that claim and bring that one defendant in to answer the
13 claim, not some 20 or 30.

14 MR. KEESE: There are multiple common questions of
15 law, in fact, that are going to be involved in this
16 litigation.

17 THE COURT: No. This is not -- this is not a class
18 action, Counsel.

19 MR. KEESE: These defendants all -- that's the
20 reason -- that's the reason why there is now pending, and the
21 end of March I believe there is going to be determination on
22 whether an MDL should be set up. That's the reason why in
23 Los Angeles County the cases have been -- have been
24 coordinated in front of one judge under one complaint for one
25 orderly progression of discovery, to identify the particular

1 plaintiffs and particular defendants, and even more so
2 because these defendants all continue to deny that the
3 Marcaine drugs destroyed cartilage in the shoulder.

4 That -- scientifically, that is a fact that's going
5 to be a disputed issue and a hotly disputed issue, I presume,
6 in each and every one of these cases. Experts would have to
7 be hired and retained and their depositions taken. It is in
8 each and every individual case, both before this Court, and
9 if it were true, nationwide for hundreds or thousands. That
10 is not an efficient way to administer justice. The most
11 efficient way to do it --

12 THE COURT: I didn't make the rules, Counsel.

13 MR. KEESE: I understand that, Your Honor. But I
14 don't think this violates the rules.

15 THE COURT: About, quote, efficiency because I
16 didn't make the rules.

17 MR. KEESE: This doesn't violate the rules, and the
18 Court has afforded great discretion in managing the cases
19 before it.

20 To break this up into 142 lawsuits would inundate
21 the Court and would cause multiple -- multiple appearances by
22 all counsel would greatly increase the litigation, both on
23 the part of the plaintiff and on the parts of the defendant
24 and on the part of the Court.

25 THE COURT: Is there a class-action case pending

1 somewhere?

2 MR. KEESE: No, there's not.

3 THE COURT: This is not a class action.

4 MR. KEESE: No, Your Honor.

5 THE COURT: Then how is it going to get to the
6 multidistrict litigation panel?

7 MR. KEESE: It is before that panel now, and I'm
8 not -- since I'm here I'm not involved in that particular
9 motion. Defense counsel can probably give you better
10 information. I believe there is a hearing set for
11 March 25th. I may be mistaken on that. But I know that
12 there is an application for multidistrict litigation, and
13 I also know that, as I said, in Los Angeles County -- all of
14 Los Angeles County state cases have been coordinated in front
15 of one Judge and there's a petition for the cases in state
16 court and statewide to go in front of that same Judge.

17 I could certainly -- we could certainly brief the
18 reasons for the economy of proceeding in this kind of
19 fashion. It hasn't been done yet, but I think it is manifest
20 with the number of cases that are involved here. That's the
21 most expeditious, expedient, and most just way of proceeding
22 with this case.

23 THE COURT: All right. Anything further?

24 MR. KEESE: If there is an adverse ruling for the
25 plaintiff, we do request that it be without prejudice. We

1 request leave to amend, and I would point out to the Court
2 that as we obtain new information -- and we have obtained new
3 information since this case came to this Court in October of
4 last year -- the 142 plaintiffs that are named, we intend to
5 request dismissal of a significant number of those.

6 I would request that the Court grant us leave to
7 dismiss any plaintiff when the plaintiffs' attorneys
8 determine in their best judgment that those specific cases do
9 not merit proceeding, rather than making motions on a
10 plaintiff-by-plaintiff basis.

11 THE COURT: Well, let me start by saying the
12 plaintiff improperly enjoined 141 plaintiffs and
13 22 defendants and the pleading lacking any fact, which
14 establishes a common nexus among the parties. Each incident
15 alleged in the complaint occurred at separate hospitals, in
16 37 different states, and two different countries over a span
17 of a ten-year period and involved different products and
18 surgeons.

19 Okay. The various motions present overlapping
20 issues of fact and law and as such the Court consolidates the
21 motions and rules on them as follows:

22 Plaintiffs do not allege that any one of them were
23 administered a particular drug or pain pump manufactured by
24 a particular defendant. Plaintiffs plead nothing more than
25 the sheer possibility that any particular defendant might

1 have manufactured the product plaintiffs received. As such,
2 plaintiffs have not pleaded plausible claims for relief. And
3 pursuant to *Ashcroft versus Eight Ball*, the entire
4 claimplaint must be dismissed for failure to state a claim.

5 Furthermore, plaintiffs are improperly joined in
6 this single action. Plaintiffs do not assert a right to
7 relief, jointly or severally, and their claims do not arise
8 out of same transaction, occurrence, or series of
9 transactions or occurrences. As such, plaintiffs may not
10 join in a single action pursuant to Rule 20A1 of the Federal
11 Rules of Civil Procedure.

12 As such, plaintiffs claims are hereby severed, and
13 any claims dismissed with leave to amend may only be
14 maintained in going forward in discrete actions.

15 Plaintiffs can amend and plaintiffs may amend their
16 negligence, negligence per se, and strict product liability
17 claims to adequately plead the claims as to each individual
18 plaintiff. Plaintiffs must also adequately plead the
19 applicability of the delayed discovery rule of any of the
20 claims facially barred by California's two-year statute of
21 limitations as to each particular plaintiff, as to each
22 particular defendant.

23 Plaintiffs may also amend their claims through
24 negligent misrepresentation, fraudulent concealment in
25 violation of state consumer fraud and accepted trade acts in

1 order to adequately plead plausible claims of relief as to
2 each individual plaintiff and as to each individual
3 defendant.

4 Plaintiffs may also claim their claim of breach of
5 expressed warranty. Privity is generally required to state
6 a claim for breach of expressed warranty; however, there is
7 a limited exception for medical products designed solely for
8 introduction into the body of a human being, as stated in
9 *Gottsdanker versus Cutter Laboratories*, 182 Cal.App.2d 602;
10 and recognized *Evraets versus Intermedics Intraocular, Inc.*,
11 since -- 29 Cal.App.4th 779, since both of the anesthetics
12 and pain pumps resign solely for introduction into the body
13 of a human being.

14 Plaintiffs' claim for breach of an expressed
15 warranty is barred as a matter of California law, and that is
16 dismissed.

17 Plaintiffs' claim for breach of implied warranty is
18 dismissed with prejudice because it cannot allege plaintiffs
19 for breach of implied warranty against defendants because
20 pursuant to *Blanco versus Baxter Healthcare Corporation*,
21 158 Cal.App.4th 1039, privity is necessary -- is a necessary
22 component of such claims, and there is no evidence to suggest
23 that plaintiffs relied on anything other than their
24 physician's skill and judgment in selecting the anesthetics
25 and pumps.

1 Defendants' arguments with respect to the motion to
2 strike are well taken under the circumstances. The motion to
3 strike is granted and defending allegation may be omitted
4 from any amended pleading.

5 Plaintiffs cannot allege design defect claims
6 against the anesthetic manufacturers, nor can plaintiffs
7 allege a failure of defendants to warn plaintiffs, the
8 public, and the FDA.

9 Finally, plaintiffs are not entitled to a
10 constructive trust over the defendants' profits or injunctive
11 relief. Should plaintiffs prevail on their claims, they will
12 be adequately compensated for their injury they personally
13 sustained by an award of damages in the proper case, in the
14 proper court, at the proper time.

15 All right. Counsel, you prepare the orders.

16 MR. STANLEY: Your Honor, if I may speak.

17 THE COURT: Yes.

18 MR. STANLEY: William Stanley on behalf of the
19 Astrazeneca defendants.

20 The only thing I would like to add here is that
21 plaintiffs' counsel just advised the Court that he does not
22 know the identity of the anesthetic maker and, therefore,
23 leave to amend would be futile because he is telling the
24 Court I can't do it.

25 THE COURT: Well, he seemed to indicate that he

1 could somewhere down the line; so we will see if he can.

2 MR. STANLEY: Leave to amend in how much time, Your
3 Honor?

4 THE COURT: I have indicated what amendments can be
5 made and by whom.

6 MR. KEESE: Your Honor, if I may.

7 THE COURT: Against whom.

8 MR. KEESE: If I may --

9 THE COURT: These are separate actions, Counsel.
10 This is not a single action. This is not a single action.
11 They're misjoinder -- total misjoinder here because there is
12 no same law or facts, particularly facts. There may be
13 overlapping law.

14 MR. KEESE: Your Honor, may I inquire?

15 THE COURT: Yes.

16 MR. KEESE: Would refiling be under a separate
17 individual case number for each plaintiff?

18 THE COURT: I have indicated how it is to be as to
19 each individual plaintiff against each individual defendant
20 so we know who is being sued and by whom because there is
21 total failure of joinder here -- total failure of joinder.

22 I don't know what the state court does with
23 joinder, but that's against their law, the joinder under
24 their law. All right.

25 THE CLERK: Item number 13.

1 MR. KEESE: Thank you, Your Honor.

2 MR. STANLEY: Thank you.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5 CERTIFICATE OF REPORTER

6
7 COUNTY OF LOS ANGELES)
8) SS.
9 STATE OF CALIFORNIA)
10

11 I, SHERI S. KLEEGER, OFFICIAL COURT REPORTER, IN AND FOR THE
12 UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
13 CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753,
14 TITLE 28, UNITED STATES CODE, THE FOREGOING IS A TRUE AND
15 CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED
16 PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE
17 TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS
18 OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

19
20
21 DATE: MARCH 18, 2009
22
23

24 _____
25 SHERI S. KLEEGER, CSR
FEDERAL OFFICIAL COURT REPORTER

PROOF OF SERVICE
F.R.C.P. Rule 5(b)(2)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 879 West 190th Street, Suite 700, Gardena, CA 90248-4227.

I hereby certify that on December 20, 2011, I served the document: **RIDDELL DEFENDANTS' NOTICE OF MOTION AND MOTION TO SEVER PURSUANT TO FRCP 20 AND 21; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF PAUL G. CEREGHINI; EXHIBIT "A" - "B"** on all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

() **BY MAIL (F.R.C.P. Rule 5(b)(2))**

() **BY OVERNIGHT DELIVERY (F.R.C.P. Rule 5(b)(2))**

() As follows: I am “readily familiar” with the firm’s practice of collection and processing documents for mailing. Under the practice, the envelope would be put in a sealed envelope and deposited with the U.S. postal service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage date is more than 1 day after date of deposit for mailing in affidavit.

(X) **BY CM/ECF:** I hereby certify that I electronically transmitted the attached document(s) to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the parties as shown on the attached Service List.

Executed on **December 20, 2011**, at Gardena, California.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

~~Regina Foley~~

SERVICE/MAILING LIST

Vernon Maxwell et al. v. National Football League, et al.

United States District Court-Central District of California - Western Division Case
No: CV 11-8394 R (MANx)

Thomas V. Girardi, Esq.
GIRARDI | KEESE
1126 Wilshire Boulevard
Los Angeles, CA 90017

Attorneys for Plaintiffs

Herman Russomanno, Esq.
Robert Borrello, Esq.
RUSSOMANNO & BORRELLO, P.A.
150 West Flagler Street – PH 2800
Miami, FL 33130

Attorneys for Plaintiffs

Jason E. Luckasevic, Esq.
John T. Tierney, III, Esq.
GOLDBERG, PERSKY & WHITE, P.C.
1030 Fifth Avenue
Pittsburgh, PA 15219

Attorneys for Plaintiffs

Ronald L. Olson, Esq.
Glenn d. Pomerantz, Esq.
John M. Rappaport, Esq.
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th
Los Angeles, CA 90071-1560

**Attorneys for Defendants
NATIONAL FOOTBALL LEAGUE and
NFL PROPERTIES LLC**

Brad S. Karp, Esq.
Theodore V. Wells, Jr., Esq.
Lynn B. Bayard, Esq.
Beth A. Wilkinson, Esq.
Bruce Birenboim, Esq.
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064

**Attorneys for Defendants
NATIONAL FOOTBALL LEAGUE and
NFL PROPERTIES LLC**